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January 5, 1978

Dr. Robert L. Brunelle  
Commissioner of Education  
410 State House Annex  
Concord, New Hampshire 03301

Dear Dr. Brunelle:

You have requested our opinion concerning resolution of a funding problem which could result from recent changes in state law with respect to education of the handicapped. Pursuant to RSA 186:11-b, the State Board of Education is responsible for administration of the handicapped education program authorized by RSA 186-A:6 (Supp. 1975), which provides:

Every handicapped child capable of being benefited by instruction shall attend an approved school or program to which he may be assigned. If a handicapped child capable of being benefited by instruction shall make application for continued educational facilities, such instruction may be continued until such time as the handicapped child has acquired education equivalent to a high school education or has attained the age of twenty-one years.

In Swain v. State Board of Education, 116 N.H. 332 (1976), the New Hampshire Supreme Court held that RSA 186-A:6 (Supp. 1975) leaves the decisions to establish a special education program and to assign a handicapped child to such a program to the discretion of the local school board. In reaching its result the Court relied in part on the language of RSA 186-A:6 (Supp. 1975) which provided, as set forth above, that a handicapped child otherwise eligible for

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special education "shall attend an approved school or program to which he may be assigned." Attendance is mandatory once an assignment is made, but the assignment itself is discretionary.

RSA 186-A:6 was amended by 1977 Laws 359:4 to provide as follows:

Every handicapped child determined by the local school district in accordance with standards set by the department of education to be capable of being benefitted by instruction shall attend an approved school or program. A handicapped child capable of being benefitted by instruction shall receive such instruction until such time as the handicapped child has acquired education equivalent to a high school education or has attained the age of 21 years.

Where the current statute as interpreted by Swain, supra, makes the establishment of special education programs and assignments discretionary, Chapter 359:4 provides that "a handicapped child capable of being benefitted by instruction shall receive such instruction." Establishment of the special education programs in accordance with RSA 186-A:6, as amended, will be mandatory as of September 1, 1978, the effective date of Chapter 359:4.

The legislative history of Chapter 359:4 reveals that the Legislature's intention in making handicapped education programs mandatory was to comply with recent changes in the federal law with respect to education of the handicapped. The report of the House Committee on Education recommended passage of House Bill 691, which became Chapter 359, stating:

Passage of House Bill 691 clarifies original legislation passed in 1973 relating to education of the handicapped and allows the State of New Hampshire to qualify for federal funds currently allocated under PL 94:142. Committee vote was unanimous. 1977 House Record 1310.

It is apparent from this statement of intent that the Legislature was aware of the federal Education of All Handicapped Children Act, Public Law 94-142, 20 U.S.C. §1401 et seq. Specifically, 20 U.S.C. §1412 (2) (B) (Supp. 1977) requires a state to develop a plan which assures that a "free appropriate public education" will be available to handicapped children in order to qualify for federal assistance

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under the Act. Failure to comply with this requirement could lead to the loss of federal aid under specifically defined programs to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. 20 U.S.C. §1416(a) (Supp. 1977).

The Legislature was also aware of recent federal regulations which proscribe discrimination against handicapped persons and which require withdrawal of all federal aid to education for failure to comply. 42 Fed. Reg. 22676 - 22702 (1977) (to be codified in 45 C.F.R. § 84 et seq.), promulgated under §504 of the Rehabilitation Act of 1972, 29 U.S.C. § 706, et seq. The minutes of the House Committee on Education refer to statements by Representative Elaine Krasker that HB 691 "mandates standards that comply to new regulations" and by Richard Lockhart of the Seacoast Regional Counseling Center that "federal funds will be in jeopardy if we don't pass this bill." When the Senate adopted the Committee Report, notation was made that "Senator Monier [was] recorded in favor of the bill with the protest of the Federal Mandate without funding" 1977 Senate Journal 630. These references can only be to the §504 regulations, failure to comply with which could result in a loss of \$15,000,000 or more in federal aid to education to the State of New Hampshire.

In view of the clear mandate of the federal scheme, the potential adverse impact on the State which could result if the State failed to comply with federal law, and the fact that the legislative history of Chapter 359 demonstrates that the amendment to RSA 186-A:6 was intended to qualify the state for federal funds under 20 U.S.C. §1401 et seq., (P.L. 94-142), it is clear that the Legislature intended Chapter 359 to satisfy the mandatory federal requirement concerning a "free appropriate education."

The question which you have asked relates to how the cost of implementing the mandatory program is to be allocated. The provisions pertaining to the allocation of the responsibility of funding were not changed in the 1977 legislative session. Under RSA 186-A:8, II (Supp. 1975), "[t]he tuition liability of the school district shall be limited to the state average cost per pupil of the current expenses of operation "of a given public school. RSA 186-A:8, VI (Supp. 1975) provides: "Within the limitations of the appropriated funds made available for the purposes of this section, the state board shall be responsible for such tuition costs which exceed the state average cost per pupil when the appropriation is sufficient so as not to jeopardize existing obligations undertaken by said board in assisting handicapped children currently under special instruction or training." The state board has informed us that appropriations to date

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have never been sufficient to meet the excess over state average costs which would be incurred in providing the requisite education. The question arises then, given the mandatory nature of RSA 186-A:6, as amended, who is responsible for funding in the event that the cost of special education exceeds that which local boards must cover under RSA 186-A:8 (Supp. 1975) and that for which the State Board of Education is liable under RSA 186-A:8, VI (Supp. 1975)?

In order to comply with the mandate of RSA 186-A:6, as amended, P.L. 94-142, and the § 504 regulations the Board of Education has only three alternatives. The first alternative is to seek legislation which would remove the limitation on the local school district's tuition liability contained in RSA 186-A:8, II (Supp. 1975). Second, the Board of Education could seek legislation which would appropriate additional funds to the State Board of Education so that there can be no disparity between the actual cost of the special education and the available appropriation. If neither of these changes should be made by the Legislature, the Board would have no choice but to follow the third alternative of adopting regulations ordering local school districts to pay the cost of special education in excess of that provided by RSA 186-A:8, II and IV (Supp. 1975). We state the Board would have no choice, bearing in mind the provisions of RSA 186:6 that the State Board "may also make the regulations necessary to enable the state to comply with the provisions of any law of the United States intended to promote vocational or other education . . . .", and the provisions of RSA 189:1-a (Supp. 1975) establishing the primary responsibility of the local school districts to provide at district expense for the elementary and secondary education of pupils within those districts.

Given the Legislature's intent to comply with 20 U.S.C. §1401 et seq. (P.L. 94-142) and other relevant federal regulations, it is our opinion that the most appropriate course of action would be for the State Board to seek legislation at the earliest opportunity which would clarify the issue of responsibility for the cost of providing education to handicapped children in excess of that defined by RSA 186-A:8, II and VI (Supp. 1975). However, since the Board of Education cannot determine at this point what the Legislature may do, we advise concurrent adop-

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tion of rules and regulations providing that local school districts should be liable for excess costs in the event of insufficient state funds.

Yours sincerely,



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